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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

TCAST COMMUNICATIONS, INC.,

Plaintiff, Cross-defendant and
Respondent,

v.

INTERNATIONAL VACATION HOMES,
INC.,

Defendant, Cross-complainant and
Appellant.

B163658

(Los Angeles County
Super. Ct. No. BC252146)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Helen I. Bendix, Judge. Affirmed.

Rogers & Harris and Michael Harris for Defendant, Cross-complainant and
Appellant.

Fell, Marking, Abkin, Montgomery, Granet & Raney and Michael D.
Hellman for Plaintiff, Cross-defendant and Respondent.

INTRODUCTION

Dispute Summarized

International Vacation Homes, Inc. (“IVH”), defendant/appellant, appeals from judgment entered following the granting of the summary judgment motion of TCAST Communications, Inc. (“TCAST”). The action was commenced as a collection matter by TCAST when IVH failed to pay sums due for communication services rendered from approximately September 1999 to June 2001.

At the time of the filing of the action, TCAST claimed the sum of \$36,514.65 from IVH. IVH claimed that it was overcharged \$16,199.17 and refused to pay anything on its bill. TCAST maintains that the bills were accurate, never disputed, and no damages were ever inflicted since none of the bills for the period relevant to this action were ever paid by IVH.

IVH filed a cross-complaint for fraud, common counts and declaratory relief.

Appellate contentions

IVH raises five contentions as follows:

1. “Was the 30-day dispute clause invalid because it was unreasonable under the circumstances?”
2. “Was the 30-day dispute clause in the contracts superseded by Respondent’s tariff?”
3. “Was Respondent precluded from protesting the billings under the tariff because Appellant had failed to pay the invoices?”
4. “Were there material issues of fact remaining regarding Appellant’s claims that the invoices and billings by Respondent were excessive and fraudulent?”
5. “Was the trial court in error in determining that Appellant’s cross-complaint for fraud was barred because Appellant could not establish damages?”

TCAST maintains that the first two issues are moot as the trial court never considered the 30-day clause but granted summary judgment on the basis that the tariff filed with the Public Utilities Commission (“PUC”) was controlling; the third issue is a “red herring” because the trial court never ruled on the issue raised in contention number three; and only the fourth and fifth issues are appropriate on appeal and should be decided in TCAST’s favor.

FACTUAL AND PROCEDURAL SYNOPSIS

IVH and TCAST entered into a written service agreement on September 28, 1999, and again on April 17, 2000, wherein TCAST was to provide telephone communication services to IVH at agreed upon rates.

IVH refused to pay for services rendered by TCAST, in spite of IVH’s promise to do so, thereby necessitating the filing of a complaint by TCAST stating causes of action for breach of contract, common counts and fraud, seeking damages for sums due and owing for services rendered, plus costs and attorneys’ fees. The complaint was filed on June 12, 2001.

IVH answered and filed a first amended cross-complaint on September 27, 2001, for money owed, common counts, declaratory relief and fraud.

On June 17, 2002, TCAST filed its motion for summary judgment or alternatively summary adjudication. IVH filed opposition and the matter was heard on or about September 20, 2002, and granted by extensive minute order setting forth the grounds for the ruling, summarized as follows:

Breach of written service agreement.

No triable issue of fact exists because the services were provided and not paid for and “sparse” opposition was asserted in the form of a brief excerpt from TCAST’s PUC

tariff stating that customer has one (1) year to submit a written notice of invoice dispute and three (3) years from date of invoice to actually dispute the invoice. Assuming arguendo that IVH is correct in contending that the 30 day period in the service agreement for disputing invoices is superceded by the tariff, no evidence was presented by IVH that it had notified TCAST of the dispute within that period of time. As to TCAST's assertion that it never received a dispute contention from IVH, IVH merely responded by stating the issue was disputed and invited court and counsel to see its answer to complaint and its cross-complaint, which the court found to be insufficient under *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720 and Weil & Brown, *California Practice Guide: Civil Procedure Before Trial*, page 10-65, section 10:199 (rev. 2002).

IVH's obligation to pay for services within 15 days of invoice.

The trial court relied on Rule 10 of the tariff in ruling that IVH had 15 days from date of invoice within which to pay for services billed. Rule 10 provides in relevant part: "Written notice to the Company of disputed invoice does not relieve customer's obligation to make payments within fifteen days of receipt of invoice."

30-day dispute limitation is valid.

IVH's reliance on *Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538 is inapposite because the issue in *Trammell* was whether failure to deliver a telegram placed a limitation on damages. The court further ruled that the argument ignored the language contained in Rule 10 of the tariff, quoted *supra*.

Fraud is unsupported by evidence of damages.

IVH's cause of action for fraud fails even though triable issues of fact exist pertaining to the propriety of charges for local loop services when TCAST was notified that such services were not required; whether the September 1999 agreement or the April 2000 service agreement is the operative agreement for purposes of the propriety of charges for the 800/888 service; and whether all T-1 lines were made available to IVH and properly billed. Even though summary adjudication of the specific contentions create triable issues of fact which leads the court to deny summary adjudication thereon, by non-payment of the invoices IVH has not suffered any damages. "Fraud without damage furnishes no ground for action, nor is fraud without damage a defense." (See *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750, 765.) The trial court also ruled that the fraud cause of action fails in view of the fact that TCAST did not commit any tortious conduct.

The common count for money owed fails for want of payment.

The cause of action for money owed by reason of alleged overcharges to IVH fails in view of the fact that there is no dispute that evidence is lacking which shows that any sums were paid at all and in view of the fact that IVH never disputed any of the invoices.

IVH filed a timely notice of appeal.

DISCUSSION

A discussion of the principles involved in the court's holding, the arguments of counsel and the decision of this court approach rhetorical proportions. Occasionally, there is a vortex that exists in the analysis of a case on appeal which so completely brings the obvious correct results into focus that very little verbiage is required. This appeal

falls within that category of cases. The vortex in this case involves one word, namely, “damages.” No damages were suffered by IVH since it did not pay any invoice from TCAST (disputed or undisputed). For sure IVH could interpose its cross-complaint in response to the claim for payment by TCAST but still the black hole at the center of the vortex in the form of damages will eventually distort and capture any effort by IVH to mount a case for recovery of any sums from TCAST. The trial court is to be commended for its extensive ruling on the matter, however, it is all assayed into a very few words: *lack of proof of damages*.

We find no cause of action pled by IVH in its first amended cross-complaint that would relieve it from pleading and proving “damages.” In the face of abject absence of such evidence in this record, the only conclusion to be reached by this court is an affirmance of the judgment.

DISPOSITION

The judgment is affirmed. Respondent awarded costs on appeal.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

MUNOZ (AURELIO), J.*

*Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.